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No. 94-1150

In the
Supreme Court of the United States
October Term, 1994

ALSTON R. KEENER,

Petitioner,

v.

EXXON COMPANY, USA, and EXXON CORPORATION,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE MINNESOTA SERVICE STATION AND CONVENIENCE STORE ASSOCIATION; WISCONSIN AUTOMOTIVE TRADES ASSOCIATION; SERVICE STATION DEALERS ASSOCIATION OF MICHIGAN; NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION; AND IOWA RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION IN SUPPORT OF THE PETITIONER

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

This Amicus Curiae brief is filed on behalf of service station and automotive repair associations representing service station dealers from states in the Sixth, Seventh, and Eighth Circuits.[1] An important function of these trade associations is to represent the interests of their members on critical issues before courts, legislatures and regulatory agencies.

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *Keener v. Exxon Company, U.S.A.*, 32 F.3d 127 (4th Cir. 1994) is an extremely serious and negative precedent for retail service station dealers nationwide because it allows discrimination between franchisees in the non-renewal of a petroleum franchise. In reaching it's decision, the Fourth Circuit majority fails to protect the franchise service station dealer by allowing him to purchase on terms equal to the jobber, the very right that was to compensate the franchisee for the otherwise permissible loss of the franchise on business grounds. Moreover, the majority reaches its conclusion through the starkest form of judicial activism by overturning the legislative burden of proof on the franchisor to show compliance with the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801-2806, by creating a burden shifting "strong presumption" which is imposed upon the franchisee.

In dissent, Judge Murnaghan aptly noted that the "strong presumption," which the majority "creat[ed] out of whole cloth," impermissibly overrides the right of Petitioner, as the party opposing summary judgment, to all reasonable

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[1] The states of Minnesota, Iowa, North Dakota, Michigan and Wisconsin are represented by the Associations participating in this Amicus Curiae brief.

inferences from the evidentiary record. *Keener*, *supra*, 32 F.3d 133-4. In a nutshell, Judge Murnaghan had no trouble in understanding why the sale of a station coupled with the loss of the franchise and without a favorable gasoline supply arrangement for 1.2 million dollars did not equal the sale of the station for 1.2 million dollars plus a supply of gasoline at a favorable price plus a franchise.

There are two issues where this case has far reaching implications and merits Supreme Court review. First, can the courts create, without any legislative support, a "strong presumption" that shifts the burden of proof from the franchisor, a burden placed squarely on the franchisor by Congress in enacting the PMPA, to the franchisee? Second, will the ability to protect the value of the franchise business, when a service station dealer is faced with non-renewal, be meaningful in that the franchisee will have an opportunity to meet a right of first refusal on terms identical to those offered to a third party? The PMPA was enacted by Congress in 1978 and there have been hundreds of lower court cases decided under it; however, this Court has yet to interpret this very significant federal statute that impacts a broad area of our energy distribution.[2]

The significance of an adequate remedy upon non-renewal and the judicial creation out of whole cloth of a "strong presumption" designed to undermine the burden of proof have far reaching implications, create a split between the Circuits, and merit this Court's review.

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[2] At the time of preparation of this brief, this Court has also been asked to grant certiorari in the case entitled *Virginia Gasoline Marketers and Automotive Repair Association, Inc. v. Mobil Oil Corporation*, Supreme Court No. 94-1000, another 2 to 1 decision from the Fourth Circuit involving the issue of preemption of state regulation by the PMPA.

II. SUMMARY OF ARGUMENT

When the PMPA was enacted in 1978, Congress had heard extensive testimony concerning the unique nature and plight of the service station retailer. By the time the PMPA was enacted, the gasoline marketing system in the United States was already well into the throes of a massive reorganization brought on, at least in part, by the oil shock crises of the early 1970's. From the oil embargo to 1978, the number of gasoline dealers in the United States declined by 35,000.[3]

Service station dealers had presented an overwhelming body of evidence which demonstrated the unique and dependent relationship they bore to the major oil companies. As a leading franchise commentator noted in 1971:

> In the Nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short-term contracts will not be renewed unless they submit to burdensome franchisor-imposed practices.
>
> * * *
>
> It is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising.

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[3] 124 Cong. Rec. §12762 (May 5, 1978) (Statement of Sen. Durkin), *cited* in *Roberts v. Amoco Oil Co.*, 740 F.2d 602, 605 (8th Cir. 1984).

Brown, *Franchising-A Fiduciary Relationship*, 49 Tex. L. Rev. 650, 655-657 (1971), *cited* in *Roberts v. Amoco Oil Co.*, *supra*, 740 F.2d 604.

The nature of that dependency is not difficult to understand in light of the unique relationship service station dealers have to the major oil companies. The franchisor not only owns the trademark, but is the landlord of the property on which the dealer does business and is the exclusive supplier of the motor fuel sold.

> In short, we have an independent small businessman who must negotiate with an oil company for his trademark, the lease on his premises, and his supply of product. It is difficult to imagine a greater disparity in bargaining power in the marketplace.

Senate Congressional Record, May 5, 1978, S. 6998 (comments of Sen. Jackson). In addition, the major oil companies have vast economic power.

There is more than one item of value at a service station property. First is the value of the real estate and improvements. Second is the value of the trademark. Third is the value of the motor fuel being sold, which depends on trademark and buying price. The first three are controlled by the franchisor. The last item of value is the value of the franchise business, a value created by the franchisee but dependent upon actions of the franchisor. During the hearings leading to the passage of the PMPA, the oil companies argued cogently that they should not be responsible for damages upon lease termination and non-renewal if the reason for the termination or non-renewal was motivated by legitimate business needs. *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 481-482 (3rd Cir. 1987) (in banc). *See*, *Hearings on H.R. 130,*

Senate Subcomm. on Energy Conservation and Regulation of the Energy and Natural Resources Committee, Publ. No. 95-61, 287 (95th Cong. 1st Sess.) (written statement of Exxon Company, U.S.A.).

The compromise that resulted in the PMPA was that if a franchisor decided to non-renew the franchise relationship because of a decision to sell the premises, as long as the franchisor made that decision in good faith and in the normal course of business, the franchisee's only remedy would be the right to purchase the station at fair market value or meet the terms of a right of first refusal offer. 15 U.S.C. §2802(b)(3)(D)(i)(III) and (iii)(I) and (II); *Slatky, supra*, 830 F.2d 481-2. If the franchisor complies with the PMPA, the franchisee must purchase in order to preserve his business value, or lose the entire value of the franchise. In effect, the PMPA provides that the franchisee could remain as a competitor in the marketplace if he could economically justify his continued operations by meeting the terms of another offer.

At this point the Fourth Circuit's majority Opinion breaks down. Blinding itself to the obvious fact that the jobber was willing to pay more for the facility than Keener because the jobber was also getting a franchise and a favorable buying price, the Fourth Circuit majority reasoned that since some of the terms were equal, namely the total price and the real estate involved, the burden shifted to Keener to overcome the "strong presumption" that Exxon's offer complied with the PMPA.

It is on these two key points, the discrimination between franchisees in connection with the non-renewal of a service station franchise and the imposition of a "strong presumption" that overrides the burden of proof on the franchisor under 15 U.S.C. §2805(c) to prove that the franchisor has complied

with the PMPA, that this brief focuses. Amicus Curiae submit that the Fourth Circuit majority was wrong. The dissent correctly reasoned that a right of first refusal must be on the same terms and conditions in order to comply with the PMPA, and that a "strong presumption" created out of whole cloth impermissibly changes the express statutory directive that the franchisor has the burden of proof that it has complied with all aspects of the PMPA.

III. ARGUMENT

A. THE FOURTH CIRCUIT DECISION ERRONEOUSLY ALLOWS DISCRIMINATION BETWEEN FRANCHISEES

If there is one point on which the Congressional Record and the decisions by the lower courts agree, it is that the PMPA was designed to prevent arbitrary and discriminatory terminations and non-renewals of franchisees.

> Congress enacted the PMPA in an effort to protect 'franchisees from arbitrary or discriminatory termination or non-renewal of their franchises.'

S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in [1978] U.S. Code Cong. & Ad. News 873, 874 ('Senate Report')*. *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1216 (7th Cir. 1982).

The essence of this case is that a franchisee who is being non-renewed must pay the same price for the right to purchase the station and continue his business operations as another franchisee who is receiving a franchise and a more favorable price to purchase product.

Congress never intended that the PMPA's provision that allows a franchisor to non-renew a franchise in order to sell the property would allow the franchisor to open a bidding war between franchisees for the same property in which the non-renewed franchisee would be put at a severe economic disadvantage in responding to the purchase proposal.

Here the discrimination is in two forms. First, the buyer for this station, Joe DeFazio Oil Company ("DeFazio") is a jobber who is receiving an Exxon franchise for the station, while Keener is losing his Exxon franchise. Second, DeFazio has a guaranteed supply of Exxon gasoline at favorable "rack" prices while Keener has no guaranteed supply and if Keener can buy Exxon gasoline at all, must buy at a price above rack, since Keener's supplier would be buying at rack price.

The burden of proof is on Exxon to demonstrate that these offers are equivalent, but Exxon of course cannot. Indeed, it defies economic common sense to believe that a station which was built by Keener to a volume of 2 million gallons annually under the Exxon trademark has an equivalent value when sold without the Exxon trademark and without the favorable Exxon buying price. This would mean that Keener's franchise has no value; but by the compromise reached in Congress that led to the requirement that Keener be provided with a right of first refusal as the surrogate for damages for loss of the franchise, Congress recognized that there was value in a franchise.

In interpreting the alternate and parallel provision under 15 U.S.C. §2802(b)(3)(D)(iii)(I) that the franchisor offer a bona fide (interpreted as fair market value) price, the court in *Slatky v. Amoco Oil Company*, *supra*, 830 F.2d 481 noted that the PMPA's structure was changed from the bill pending in the 94th Congress to the bill ultimately enacted by the 95th Congress. Under H.R. 13000 (94th Cong.) the franchisor

could mitigate damages by making a bona fide offer to sell the station. In the 95th Congress, the bona fide offer became "a surrogate for damages" under H.R. 130 which became law. *Slatky v. Amoco Oil Co.*, 830 F.2d 481.

In this case, DeFazio was to receive an Exxon franchise for Keener's station if DeFazio purchased the property. DeFazio is a "jobber" who would buy at "rack" prices. DeFazio was going to operate as the retailer, just as Keener had, but DeFazio also had the dual advantages of being able to buy Exxon gasoline (1) as an Exxon franchisee (2) at Exxon's "rack" price, a lower wholesale price than paid by a dealer like Keener.[4]

There is no question that DeFazio was receiving a franchise to operate an Exxon facility at Keener's station. DeFazio was receiving a contract for the supply of motor fuel under a trademark owned by a refiner. 15 U.S.C.§2801(1)(A) or (B) and (4). Viewed simply, if Exxon was non-renewing Dealer A on the basis that Dealer A must pay the same price for the station as Dealer B being offered the same station plus the franchise, the court could easily determine that the following mathematical formula demonstrates that the franchisor has not complied with the PMPA:

(Purchase of Station) + (Franchise and Trademark) ≠
(Purchase of Station) - (Franchise and Trademark)

In that case it is easily discernable that there is a discrimination between the two franchisees in the non-renewal of the franchise since one is receiving a franchise and the other is

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[4] Compare *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990) in which the court recognized the existence of pricing disparities between jobbers and dealers in a Robinson-Patman action.

losing a franchise. In this case, however, the discrimination and differential is even greater, as shown by the following formula:

(Purchase of Station) + (Franchise and Trademark) +
(Reduced Buying Price) ≠
(Purchase of Station) - (Franchise and Trademark)

But in taking over Keener's station, DeFazio, while ostensibly a jobber, was functionally a franchise retailer like Keener had been, only with a better buying price.

The Fourth Circuit majority erred when it concluded that "whatever advantage DeFazio Oil may have had, however, resulted from its preexisting distributor relationship with Exxon . . ." *Keener, supra*, 32 F.2d 131. That assumption is untrue. DeFazio's advantage existed from the fact that Exxon was willing to give DeFazio a franchise for the Keener station, and give DeFazio the right to buy Exxon gasoline for the station at the rack price.[5] What the majority misses is that Exxon was treating DeFazio just as a franchisee dealer, namely that it was giving DeFazio the trademark and right to market gasoline at retail from Keener's station. The difference was that DeFazio was going to get a lower buying price. This form of price discrimination raises serious Robinson-Patman

[5] The majority in footnote 4 of it's decision demonstrates why the burden shifting is so egregious as to Keener. The court assumes that there is "no indication that the station sales contract in itself guaranteed DeFazio Oil a supply of Exxon gasoline." *Id*, 32 F.3d 131. This elevates conjecture over reason. Under DeFazio's station sales contract, he had to resell the station to Exxon if he ceased selling Exxon branded gasoline at any time over the next 21 years. Even in the absence of a separate supply agreement, the station sales contract between DeFazio and Exxon clearly demonstrated an intent to provide DeFazio with Exxon gasoline at the rack price.

Act implications. *Texaco Inc. v. Hasbrouck, supra*, 496 U.S. 543. The only way that Exxon can justify a lower buying price to DeFazio than to Keener is if DeFazio is providing jobber "functions" and then only a functional difference. The Fourth Circuit majority points out that Keener had an ability to secure supplies of Exxon gasoline from jobbers. The difference in buying price is self-evident since the jobber will require a profit for its services and materials.

Ultimately the decision is simple: allowing one class of franchisees the right to purchase a station and receive a more favorable buying price is discrimination in connection with non-renewal when another class of franchisees must pay the same price for the station but without the franchise and the buying price advantage when both will operate in the same functional position.

The well reasoned *in banc* decision by the Third Circuit in *Slatky v. Amoco Oil Co, supra*, applies here. If the right to purchase the station became the surrogate for damages upon loss of the franchise, then the Court must interpret the PMPA to assure that the franchisee has meaningful protection in exercising that surrogate. A right of first refusal must mean on equal terms or it becomes not a surrogate for damages, but an invitation to creative manipulation that disenfranchises service station dealers without an effective remedy. The service station dealer is not seeking to repeal the free market forces, but only seeks an equal opportunity on equal terms when entering the playing field.

B. A RIGHT OF FIRST REFUSAL MUST ENCOMPASS IDENTICAL TERMS OR IT BECOMES MEANINGLESS

It is a fundamental premise of the law that a right of first refusal must allow and require the person receiving the right to meet the identical terms and conditions of the previous offer. A right of first refusal requires application of the "mirror image" standard, both in terms of the offer and the acceptance. Any other rule creates ambiguities in the contracting relationship, and allows one party or the other to vary the terms to its own convenience and to the detriment of the other party.

The PMPA's right of first refusal applies to the "franchisor's interest" "in the leased marketing premises." 15 U.S.C. §2802(b)(3)(D)(iii)(II). "Leased marketing premises" is defined in 15 U.S.C. §2801(9) to include "marketing premises owned, leased or in any way controlled by a franchisor . . ." In this case, Exxon was going to continue to have an interest in and control over the leased marketing premises under the DeFazio offer, since Exxon retained the right to repurchase the premises from DeFazio if DeFazio did not market Exxon motor fuel for 21 years. This meant that Exxon's interest in the leased marketing premises included the right to market Exxon gasoline through DeFazio. Exxon wasn't offering to convey to Keener the same interests in the leased marketing premises that DeFazio was to receive from Exxon.

DeFazio is receiving a franchise and DeFazio is receiving a long term gasoline supply commitment at favorable rack prices. These are items of value to DeFazio. The advantage to DeFazio did not, as the majority concludes, stem from his "preexisting distributor relationship with Exxon." *Keener*, 32

F.3d 131. Rather the advantage arose because of Exxon's willingness to extend that relationship, a franchise, to Keener's station while denying the same advantages to Keener.

Assume, since no proof on the buying differential was offered by Exxon which bore the burden of proof, that the differential in the rack price and the price at which Keener could buy Exxon gasoline was 5¢ per gallon. Even giving DeFazio the benefit of the doubt that he would only buy 1.7 million gallons per year from Exxon, pursuant to his supply arrangement,[6] the value to DeFazio would be 5¢ x 1.7 million gallons x 21 years = 1.785 million dollars. At 3¢ per gallon for 1.7 million gallons annually, the difference is 1.07 million dollars. Three cents per gallon for 2 million gallons annually is a difference of 1.26 million dollars. Reducing those amounts to present day values could easily account for the differential between the amount DeFazio was willing to pay and the fair market value of the station. Drawing reasonable inferences in Keener's favor, the station price differential was not an "unacceptable windfall" to Keener but the price differential arising from the disparity in terms between DeFazio's offer and Keener's created by Exxon. *Id*, 32 F.3d 132.

The mirror image rule, contrary to what the majority found,[7] is the simplest rule. Any other rule requires that the Court attempt to balance and weigh competing terms and their values. Requiring that Exxon offer to sell the station to Petitioner Keener on the same terms as the arrangement with DeFazio, namely the purchase price plus the franchise plus the

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[6] There is no reason to believe that DeFazio would not receive the 2 million gallons per year from Exxon that Keener had been able to sell from the station, and all these calculations assume gasoline volumes remain constant and not grow.

[7] *Keener, supra*, 32 F.3d 131.

favorable buying price, means that the Court will not have to examine other aspects of the economic arrangement.

C. THE FOURTH CIRCUIT'S CREATION OF A "STRONG PRESUMPTION" IMPROPERLY REVERSES THE BURDEN OF PROOF UNDER THE PMPA

The Fourth Circuit has created a "strong presumption" despite absolutely no legislative support for the creation of this assumption, despite the fact that no other court has found such a presumption to exist, and despite the fact that the Fourth Circuit's position is contrary to the express requirement of the PMPA that the burden of proof is on the franchisor. 15 U.S.C. §2805(c). The decision by the Fourth Circuit majority is contrary to the parallel decision by the Third Circuit interpreting the requirements of a "bona fide" price under 15 U.S.C. §2802(b)(3)(D)(iii)(I), which is the alternative to a right of first refusal. The *Slatky* court *in banc* rejected the concept that a "bona fide offer" required only the franchisor's subjective good faith, and instead tied it to fair market value.

> As we have discussed, the overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship. Because of the distributor's need to adjust to changing market conditions, however, Congress permitted distributors to end the franchise relationship for legitimate business reasons. Yet in doing so, distributors still deprived franchisees of their reasonable expectations. The bona fide offer provision therefore serves as a second, and distinct, layer of protection, assuring the franchisee an

> opportunity to continue to earn a livelihood from the property while permitting the distributor to end the franchise relationship.

Slatky v. Amoco Oil Co., supra, 830 F.2d 484.

The *Slatky* court went on to hold that a bona fide offer requires an objectively established fair market value. In footnote 7, the *Slatky* court indicated that it was not excluding the possibility of other relevant factors, and indicated that "an offer approaching fair market value might be hedged with unreasonable conditions of sale." *Slatky*, 830 F.2d at 485, fn 7.

While the Third Circuit recognized that the terms of an offer could impact fair market value, and hence deserve scrutiny, the Fourth Circuit majority in this case not only rejected that approach, but placed the burden on the franchisee to demonstrate that the franchisor had not complied with the PMPA.[8] This approach erroneously shifts the burden of proof under the PMPA, and operates as a complete surprise to a franchisee preparing to respond to a summary judgment motion in which the franchisee has only the burden of demonstrating that there is a franchise and it is being non-renewed before the burden shifts to the franchisor. 15 U.S.C. §2805(c). If such a standard were to be adopted, it could only be applied prospectively in a summary judgment setting.

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[8]The Fourth Circuit claims "maximum economic efficiency" justifies the creation of a strong presumption. *Keener, supra*, 32 F.3d 130, 131. *Slatky* correctly reasoned that the PMPA's purpose of franchisee protection takes precedence and requires meaningful protection for the damages surrogate. The Fourth Circuit's failure to apply the principle that franchisee protection is the overriding purpose of the PMPA puts it in conflict with other circuits. *Slatky v. Amoco Oil Co.*, 830 F.2d 484 (3rd Cir. 1987) and *Hilo v. Exxon Corp.*, 997 F.2d 641 (9th Cir. 1993).

In fact, the burden was on Exxon to demonstrate that the additional terms being offered to DeFazio, namely a franchise, trademark and a reduced buying price, did not alter the value of offer to purchase the station by Petitioner Keener. Exxon made no showing that these provisions did not contribute substantial value to DeFazio in connection with DeFazio's offer.

It is extremely critical that this Court grant certiorari to reverse the unfounded attempt by the Fourth Circuit to shift the burden of proof to the franchisee, by creating a strong presumption that the same price for the same property means that the franchisor has complied with the PMPA unless the franchisee can show otherwise. Indeed, the Fourth Circuit's Opinion is expressly contrary to the Ninth Circuit decision in *Ellis v. Mobil Oil Corp.*, 969 F.2d 784 (9th Cir. 1992), the First Circuit in *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991), and the Tenth Circuit in *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987).

IV. CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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